
IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRANK WATERHOUSE & CO., Inc.,
Appellant,

vs.

GRENVILLE M. DODGE and FRANK
WATERHOUSE,
Appellees.

In Equity

APPEAL FROM THE UNITED STATES CIRCUIT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

Brief for Appellant

W. H. BOGLE,
CHARLES P. SPOONER,
Solicitors for Appellant.

377 Colman Block
SEATTLE, WASHINGTON.

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STATEMENT.

In January, 1904, the appellant was the owner of the steamship "Garonne." One W. H. Ferguson, acting for an undisclosed principal, who, as it subsequently transpired, was the North Alaska Steamship Company, entered into an option contract to purchase this vessel from the appellant, the terms of which contract are expressed in the telegram from the appellant to said Ferguson under date of February 3, 1904, in words as follows:

"Seattle, February 3, 1904.
"W. H. FERGUSON, Fifth Avenue Hotel, New York, N. Y.

“Your thousand received and accepted and I now confirm sale of ‘Garonne,’ provided you pay me fourteen thousand dollars February fifteenth, deferred payments to be made as follows: Ten thousand dollars March fifteenth, ten thousand June fifteenth, five thousand September fifteenth, five thousand November fifteenth, all this year; five thousand February fifteenth, five thousand April fifteenth, five thousand June fifteenth, five thousand August fifteenth, five thousand October fifteenth, ten thousand December fifteenth, all nineteen five; five thousand March fifteenth, nineteen six, deferred payments to be secured by first mortgage on steamer, assignment marine insurance, corporation bond guaranteeing vessel against indebtedness and other security which shall be satisfactory to me. Sale conditioned on terms and representations my letter to you January twenty-sixth. Confirm this understanding.

F. W.

FRANK WATERHOUSE.”

(p. 361 Transcript.)

The letter referred to in this telegram is found on page 362 of Transcript. The purchase price was \$85,000, \$1,000 being paid in cash and \$14,000 to be paid on February 15, 1904. The deferred payments were to extend over a period of two years, and to be secured (1) by a mortgage on the vessel, (2) an assignment of the marine insurance, (3) a corporation bond to protect the seller and his security from any indebtedness that might be contracted by the purchaser on the credit of the vessel, and (4) by other securities to be satisfactory to the seller. It was contemplated that the purchaser would accept title to the vessel on February 15th, when the \$14,000 was paid, and would at that time furnish the securities called for by the contract. On February 5th Ferguson wrote to

appellant confirming the terms of the sale, but stating that they would take title and finish up the details on the payment of the \$10,000 due March 15th, instead of at the time of the payment on February 15th.

(See Transcript, p. 429.)

On February 10th the appellant wired Ferguson as follows:

“February 10, 1904.

“W. H. FERGUSON, Fifth Avenue Hotel, New York, N. Y.

“Received your letter fifth. A vital condition of sale Garonne to you was that purchase should be entirely completed by February fifteenth by exchange of steamer for fifteen thousand cash, notes, mortgage bond and other satisfactory collateral. Am willing accept fourteen thousand next Monday, provided you agree execute notes, mortgage bond and deliver securities by March first, or forfeit the fifteen thousand if you fail; but I want you to advise by wire what character of collateral to deferred payments you will furnish in addition to mortgage and bond, so I may pass upon same by Monday. I guarantee Garonne good insurable risk, and will pass United States inspection for commission, by expenditure on your part of about seventy-five hundred dollars. Am now doing considerable work on her my own expense, preparatory to inspection. Other parties anxious to purchase her next Monday at same price for practically cash.

Rush.

FRANK WATERHOUSE.”

(p. 425 Transcript.)

On February 11th Ferguson wired appellant in answer as follows:

“New York, February 11: 04.

“FRANK WATERHOUSE, Burke Bldg., Seattle, Wash.

“Understand Garonne transfer on payment twenty-five thousand my principal understands same and has gone south cannot reach Seattle until March tenth or

twelfth. We propose pay fourteen thousand Feby. fifteenth, ten thousand March fifteenth, make then Notes for balance mortgage insurance policy good security bonds or cash I may not reach Seattle until March fifth Will pay shipkeeper until transfer.

W. H. FERGUSON."

(p. 428 Transcript.)

This settled the terms of the contract definitely, and on February 15th C. B. Smith, President of the North Alaska Steamship Company, for whom Ferguson had been acting, paid to appellant the \$14,000 due on that date and appellant gave him a receipt therefor in words as follows:

"Received, Seattle, February 15, 1904, of C. B. Smith, Fourteen Thousand Dollars, being payment due this day on contract for purchase of Steamship "Garonne." Another payment of \$10,000.00 and the execution of notes, mortgage, bond and collaterals for deferred payments are to be made and completed on or before March 15, 1904, as per terms of contract; and if default is made by said Smith in making said further payment or in execution of said securities on or before March 15th next, then his right to purchase said vessel shall cease, and all moneys paid by him toward such purchase shall be forfeited to and be and remain the moneys of this Company.

FRANK WATERHOUSE & Co., Inc.,

By FRANK WATERHOUSE,

President."

(p. 426 Transcript.)

On March 15th the purchaser remitted to the appellant from New York \$7,000.00, and on March 18th a further sum of \$3,000.00, making the \$10,000 due March 15th. but was not able to take title and furnish the bond and securities called for by the contract. It will be observed

that under the contract the appellant held the title to the vessel and the sale was upon the express condition that the payments should be made as they matured, and that these securities should be furnished on or before the 15th of March, 1904. The purchaser continually promised to furnish these securities and take the title to the vessel, but failed to do so. The appellant, without waiving any of its rights under the contract, did not enforce the forfeiture at that time, but was constantly insisting that the purchaser should take title and furnish the securities as agreed upon. (See Transcript, pp. 208, 444, 422, 411, 406, 405, 401, 446, 441.) In April, 1904, the appellant prepared and signed a bill of sale of the vessel to the North Alaska Steamship Company, and deposited it with the Chase National Bank of New York, to be delivered to the purchaser upon the furnishing of the securities called for by the contract. (Transcript, pp. 415, 257-8.) The purchaser at various times stated that they would be able to furnish the securities in a short time, and in one of their communications stated that they had made an arrangement with Gen. G. M. Dodge, the appellee in this case, that would fully protect the appellant. No statement was ever made, however, as to what the nature of that arrangement was. (See Transcript, pp. 404-5, 212.) In the meantime, after making the payment of March 15th, the appellant permitted the purchaser to take a qualified possession of the vessel for the purpose of mak-

ing certain repairs and betterments, which the purchaser desired to make, and preparing for the Nome season. This was upon the distinct agreement, however, that no indebtedness should be incurred against the vessel, and that all repairs, betterments and supplies should be paid for in cash by the purchaser, and the vessel kept free of incumbrances. (See Record, p. 209.) It soon began to develop, however, that Ferguson and Hastings, the representatives of the purchaser, were incurring debts for material, labor and supplies on the credit of the vessel, and the appellant was constantly urging the purchasing company to discharge these debts and consummate its agreement of purchase. In fact, from about the first of April until the first of June the appellant was urging and insisting that the debts thus incurred against the vessel should be promptly paid off, and the contract consummated. The record shows that the appellant not only insisted upon this, but time and time again threatened to cancel the contract and forfeit the payments theretofore made by the purchasing company, unless these debts were paid and the securities called for by the contract furnished. (See Transcript, pp. 444-5-6.) The purchasing company did make various and sundry payments, both upon the purchase price and in discharge of debts incurred by it for labor, material and supplies for the vessel, and as the Nome season approached, that company constantly assuring the appellant that it would carry out its contract

in full before the vessel sailed, made all arrangements for operating the steamer during the Nome season, and engaged a full cargo of freight and passengers for the voyage to commence about the first of June. Finally during the latter part of May, the appellant, having exhausted its patience, notified the North Alaska Steamship Company that unless these debts incurred against the ship were promptly paid off and the terms of the contract of purchase complied with by the furnishing of the securities called for by the contract, it would not permit the vessel to sail in charge of the North Alaska Steamship Company, and would cancel the contract of purchase. (See Record, pp. 448-, 401.) On or about the first of June, 1904, C. B. Smith, the president of the North Alaska Steamship Company, appeared in Seattle, and at the same time one Frank S. Pusey appeared here representing the appellee Dodge. Pusey claimed that the North Alaska Steamship Company was indebted to Dodge in the sum of \$10,000 borrowed money, and he was desirous of securing that indebtedness. Smith was a friend of Dodge and apparently willing to secure him as far as was possible. At that time the balance due the appellant for purchase money was something over \$55,000. There were outstanding bills incurred by the North Alaska Steamship Company for labor, material and supplies for the vessel, and which were liens on the vessel, but the exact amount thereof was not known. These debts had been incurred

by Ferguson and Hastings, and the appellant had no means of ascertaining the amount so outstanding. They had made inquiries, however, and quite a number of the bills had been sent to the appellant with demand of payment, it being known that the appellant was the owner of the vessel. So far as the appellant could ascertain at that time, these outstanding bills amounted to between \$13,000 and \$15,000. The situation then was as follows:

Appellant held the title to the vessel and there was a balance due them of something over \$55,000 on the purchase price. The purchaser had failed to comply with the terms of the contract which called for a bond guaranteeing that no debts would be incurred against the vessel, and for security for balance of deferred payments. These were vital conditions in the contract of sale, and had never been waived in any way whatever. The appellant, however, was not disposed to be unduly exacting, and was willing to give the purchaser fair and reasonable opportunity to carry out his contract, provided appellant was amply secured in the balance due it for purchase money. The vessel at that time, as stated above, was ready to sail for Nome, and had a full cargo of freight and a full passenger list, and part of the moneys received from freight and passengers had been paid over to the appellant and had been applied partly to the outstanding supply debts against the ship, and partly on the balance of purchase price, reducing the amount due on purchase

price to a little over \$37,000. After two days' negotiations, appellant finally agreed with Smith, the president of the North Alaska Steamship Company, that if his company would pay all of the outstanding labor, material and supplies, then estimated to be between \$13,000 and \$15,000, and would take title to the vessel and give appellant a first mortgage thereon for the balance of thirty-seven thousand and odd dollars, payable in twenty and forty days from that date, they would consent to the vessel sailing in charge of the North Alaska Steamship Company on the voyage. Smith agreed to these terms and stated that he would wire to the company in New York the amount of the outstanding indebtedness, and that the company would telegraph the money within forty-eight hours to pay the same in full. At the same time Smith entered into an agreement with Pusey, representing Dodge, agreeing that the company would give him a second mortgage on the vessel for the \$10,000 claimed by him, payable in sixty days from that date, and would also assign to him \$5,000 of the freight money on the cargo payable at Nome upon the arrival of the ship and delivery of the cargo. As a matter of convenience it was agreed that one mortgage should be taken securing both the appellant and Dodge, the mortgage expressing on its face that the appellant's claim should be prior and paramount. It was further agreed between appellant and Dodge as a matter of convenience and for the accommodation of Dodge, that appellant would act as trustee for Dodge in

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taking said mortgage. This trust agreement is set out at large in the record on page 537 of the Transcript. Pursuant to these arrangements, notes were drawn payable to appellant, in twenty and forty days for the amount due it, and a separate note payable to the appellant as trustee for the \$10,000 owing to Dodge, and these notes were signed by Smith as president of the North Alaska Steamship Company. A bill of sale of the vessel by the appellant to the North Alaska Steamship Company was also drawn and signed by appellant and a mortgage was drawn to be executed by the North Alaska Steamship Company, securing the debt due appellant and also the debt due Dodge, and expressing the priority of appellant's debt. The home office of the North Alaska Steamship Company was in New York, and its board of directors and secretary were also there. The mortgage was signed by Smith, as president of the North Alaska Steamship Company, and the bill of sale and mortgage were then forwarded by the appellant to the Chase National Bank, with instructions to deliver the bill of sale to the North Alaska Steamship Company upon its completion of the execution of the mortgage by proper resolution of its board of directors, and the signature by the secretary under the seal of the company. These various documents are found on page 538 of the Transcript. The letter to the Chase National Bank enclosing the documents is found on page 383 of the Transcript. At the same time appellant wrote the Occi-

dental Securities Company of New York (which company was the holder of all of the stock of the North Alaska Steamship Company, and its financial agent) setting forth the terms of the agreement with Smith and requesting that company to promptly remit the money to pay off these outstanding bills and complete the execution of the mortgage. (Transcript, p. 386.) This was the status of things when the "Garonne" sailed with Smith on board for Nome. Pusey had appointed Smith agent to collect the \$5,000 freight money assigned by Smith as president to Dodge as additional security for his debt. (Transcript, p. 549.) No money was remitted from New York to pay these outstanding debts. When the documents above referred to were received there, the officers and board of directors of the company refused to execute the mortgage or to make further payments on the debts of the company, and stated that they wanted to make some further investigation before assenting to the agreement made by Smith. (See Record, pp. 369-371.) Some time about the middle of June, 1904, one S. C. Mead was sent to Seattle to investigate the condition of the North Alaska Steamship Company's affairs on behalf of that company and its stockholders. (See Record, p. 371-2.) By that time the appellant had discovered that the outstanding bills for labor, material and supplies incurred by the North Alaska Steamship Company upon the credit of the vessel amounted to something over \$30,000, instead of from

\$13,000 to \$15,000 as had been supposed at the time Smith and Pusey were in Seattle. Mr. Mead, after making his investigation and ascertaining these facts, stated that the indebtedness was much larger than had been anticipated by the company, and that the company had been misled by the representations of Ferguson as to the amount of these bills, and requested Mr. Waterhouse, the president of the appellant company, to return to New York with him and have a full conference with the company and those interested in it as to what was best to be done for the interest of all parties. Mead assured him, however, that the company would make some satisfactory arrangement with him to take care of these debts and to carry out its contract. Accordingly Mr. Waterhouse and his attorney returned to New York with Mr. Mead, arriving there about the first of July. A meeting of all parties interested in the North Alaska Steamship Company and in the Occidental Securities Company was immediately called by Mr. Mead. At that meeting Mead made his report of the condition of affairs as disclosed by his investigation; showing that the company was indebted in the sum of about \$30,000 for outstanding current bills for labor, material and supplies, bought at Seattle by Ferguson, the company's representative, and which were in the main past due and constituted lien upon the ship. The balance due Waterhouse on the purchase price, after crediting some \$18,000 of freight and passenger receipts, was

\$37,671.46. Waterhouse called upon the company and those interested in it to make some arrangement to pay off this current indebtedness, and either carry out the original contract of purchase, or consummate the agreement made by Smith. In either event the first consideration was to pay the outstanding current bills which were liens on the ship. The discussion among the parties interested in the North Alaska Steamship Company disclosed a lack of harmony among the stockholders, some of them, including a Mr. King of New York, claiming that their subscriptions for stock of the company had been procured by false representations made by the officers of the company as to the condition of its affairs. The negotiations between Waterhouse and these people continued until the 8th or 9th of July. Waterhouse, in his eagerness to secure a settlement of his debt, offered if they would pay the current outstanding bills, to extend the payments of the balance due him for six, twelve and eighteen months, provided all obligations that were liens against the ship should be taken up, so that his should be the first lien and the company should protect him against the incurring of any other indebtedness that would be a maritime lien superior to his lien. Finally on the 8th of July the stockholders of the company reported that they were absolutely unwilling to put up more money for the company, and the officers of the company thereupon announced their utter inability to pay off the current lien

debts against the ship, or to make any further payments. The company was admitted to be without assets of any kind. Waterhouse thereupon gave the company written notice that unless these current lien debts were at once paid off, and the company carried out the terms of his contract by furnishing the securities agreed upon, he would declare the contract forfeited, draw down the documents that had been deposited in the Chase National Bank (the bill of sale and uncompleted mortgage) and resume possession of the ship. On the next day the company, by resolution of its board of directors, abandoned the contract of purchase, and directed its attorneys to take steps to recover the purchase money that had been previously paid to Waterhouse, and the attorneys thereupon served a written notice upon Waterhouse to that effect. (See pp. 432-6 of Transcript.) Waterhouse then found himself with the ship thrown back on his hands incumbered by something over \$30,000 of current bills which were liens on the ship and past due, and the most profitable part of the Nome season past, and threatened with litigation by the North Alaska Company on their claim for the moneys that they had previously paid to Waterhouse on the contract of purchase. A conference was then had between the attorney for the North Alaska Company and the attorney for Waterhouse & Company, which resulted in an agreement that the North Alaska Company would waive any claim for a return of the purchase money previously paid to Waterhouse & Company, and Waterhouse

& Company would waive any claim against the North Alaska Company for the balance of the purchase price, amounting then to some \$37,671.46; and Waterhouse also waived any claim to the freight money on previous voyage payable at Nome, which had been assigned by the North Alaska Company to Dodge, and turned over to Smith for collection for the account of Dodge. Receipts were thereupon passed between the North Alaska Company and Waterhouse waiving and releasing any claim, each against the other. After this adjustment Waterhouse found himself embarrassed by these debts which were liens against the ship, being for labor, material and supplies, and approached Mr. W. F. King, who was one of the stockholders of the other company, and complained to King that he had been misled and badly treated and found himself in an exceedingly embarrassing position financially because of this heavy indebtedness thrown back upon him, and asked King if he would not assist him in some way in relieving himself of this embarrassment. King recognized the fact that Waterhouse had been badly treated, and expressed a disposition to assist him, if Waterhouse could suggest a practicable way in which it could be done. Waterhouse thereupon proposed to King that if he, King, would put up \$30,000 with which to pay off these current liens on the ship, he, Waterhouse, would put in the balance of the purchase money due him, say \$37,000, and the two of them would own the ship in that

proportion, that is to say, that the ship would be conveyed to a company capitalized at \$67,000, of which Waterhouse would pay \$37,000 and King \$30,000 in stock. After some consideration, King accepted this proposition, except that he wished a modification of it, so as to give him an equal voice in the management of the company that was to take hold of the vessel, and suggested that the company be organized with a nominal capital stock, which stock should be held by King and Waterhouse in equal parts, and that that company should execute its notes to Waterhouse for \$37,000 and King for \$30,000. This modification was accepted by Waterhouse and the agreement thereupon between him and King reduced to writing. (See Transcript, pp. 282 and 334.)

Waterhouse thereupon returned to Seattle, and King shortly thereafter incorporated the Merchants & Miners Steamship Association of New York, pursuant to the terms of the agreement with Waterhouse. The vessel was subsequently conveyed to that company, and it executed its notes to Waterhouse for \$37,000 and to King for \$30,000, but no capital stock was ever in fact issued or subscribed for. This was in July, 1904. Subsequently, in April, 1905, the Merchants & Miners Steamship Company sold the vessel to the White Star Steamship Company for \$90,000, par value, of the stock of that company.

After Pusey left Seattle, he went South and did not reach New York until after the negotiations above re-

ferred to. When Waterhouse reached New York with Mead, he requested the parties there to bring in all parties in New York who were in any wise interested in the North Alaska Steamship Company, whether as officers, stockholders or creditors, and explained to all of the parties the nature of the agreement which Smith had undertaken to make for the company, but which the company had failed to carry out, with respect to the Dodge debt, and asked that General Dodge be communicated with and brought in. Mr. Corwine, who was one of the stockholders of the New York Company, agreed to make inquiries as to the whereabouts of General Dodge, and reported to Mr. Waterhouse that General Dodge was out of the city and could not be reached. General Dodge was not present at any of the meetings in New York and no further attempt was made by Waterhouse to get into communication with him during these conferences. (See pp. 275-6 and 231 of Transcript.) Dodge was informed by some of the officers of the North Alaska Steamship Company of the transactions that had taken place some time during the latter part of July, 1904, and was also informed by Waterhouse by letter soon thereafter in answer to a letter received from Pusey. (See Transcript, pp. 495-6.) No further action was taken by Dodge until the 26th day of April, 1905, when the bill of complaint in this case was filed.

When Smith assigned the freight money, amounting to \$5,000, to Dodge in June, 1904, Pusey appointed Smith

Dodge's agent to collect this money at Nome, and to remit the same to the Seattle National Bank to the credit of Waterhouse & Company as trustee. Smith never collected the money, or if he did, he misappropriated it, and none of it was ever remitted to either the Seattle National Bank or to Waterhouse & Company. The testimony shows that Smith used the money at Nome for the benefit of some other companies in which he was interested. (Transcript, pp. ———.) The court below held that the transactions had between Waterhouse, Pusey and Smith on July 2nd constituted Waterhouse an active trustee for the collection of the Dodge debt; that the mortgage then signed by Smith as president of the North Alaska Steamship Company constituted a lien upon the vessel for the securing of Dodge's debt, notwithstanding the fact that the mortgage was never executed by the secretary and that the board of directors refused to authorize its execution; that the conveyance of the vessel by Waterhouse & Company to the Merchants & Miners Steamship Company was in violation of the duty owing by Waterhouse & Company to Dodge under the alleged trust agreement had rendered Waterhouse & Company personally liable for the full amount of Dodge's debt against the North Alaska Steamship Company, together with interest and attorney's fees, as provided in the note executed by Smith for that company, and a decree was entered accordingly. The case was dismissed as to Frank Waterhouse individually.

Waterhouse & Company appealed from that decree and assigned error as follows:

I.

The suit was brought to charge this appellant as trustee with an indebtedness alleged to be owing by the North Alaska Steamship Company to the appellee, Grenville M. Dodge. The debtor, North Alaska Steamship Company, is an indispensable party to the proceedings, and the court below erred in entertaining jurisdiction of the cause in the absence of the North Alaska Steamship Company from the record.

II.

The court below erred in rendering judgment against this appellant in favor of appellee, Grenville M. Dodge, and in refusing to enter decree dismissing said cause.

ARGUMENT.

I.

The North Alaska Steamship Company, which is the debtor of Dodge, was an indispensable party. Inasmuch as that company was a corporation organized under the laws of the State of New York, of which state Dodge was also a citizen, it could not be made a party to this suit without defeating the jurisdiction of the court. Nevertheless, if it was an indispensable party, the court was with-

out jurisdiction to proceed to adjudicate as between the parties of record.

The theory of the bill of complaint is that the North Alaska Steamship Company is indebted to Dodge in the sum of \$10,000, with interest; that sufficient securities to secure this indebtedness were held by appellant Waterhouse & Company, and that by its dealings with these securities Waterhouse & Company have become liable to Dodge for this debt. Manifestly there could be no liability upon the part of the appellant to Dodge unless in fact there is shown to exist an indebtedness from the North Alaska Steamship Company to Dodge. We insist that the court had no jurisdiction to adjudicate that such an indebtedness was in existence in the absence of the debtor from the record.

Saloy vs. Bloch, 136 U. S. 338;

Gregory vs. Stetson, 133 U. S. 579;

California vs. S. P. R. Co., 157 U. S. 229;

Consolidated R. Co. vs. City, 93 Fed. 849.

The court below apparently recognized the soundness of this position, but held that the exchange of receipts and releases between Waterhouse & Company and the North Alaska Steamship Company in New York in July, 1904, in some manner operated to discharge the North Alaska Steamship Company from its indebtedness to Dodge, and operated as an assumption of that indebtedness by Waterhouse & Company. We think this is a

palpable misconstruction or misconception of what was done between those parties. The fact was that the North Alaska Steamship Company had contracted to buy this vessel from Waterhouse & Company on certain terms and had made various payments thereon, and afterwards had defaulted upon its contract. It abandoned its contract of purchase, thus throwing the vessel back on Waterhouse's hands encumbered with some \$30,000 of maritime liens incurred by the North Alaska Steamship Company for labor, material and supplies for the vessel. In order to avoid threatened litigation between the parties, Waterhouse & Company released the North Alaska Steamship Company from any liability for the unpaid purchase money on that vessel, and the North Alaska Steamship Company released Waterhouse from any liability to return any part of the purchase money previously paid. To effectuate this arrangement full releases were exchanged between these parties. Neither party was dealing with the Dodge debt in that transaction, nor did Waterhouse & Company intend to, nor did they in fact release the North Alaska Steamship Company from any indebtedness it owed to Dodge, whether such indebtedness was evidenced by notes running to Dodge, or by notes running to Waterhouse as trustee for Dodge. The release given by Waterhouse & Company to the North Alaska Steamship Company was given in their own right, and did not operate to release any debt that might be due them as trustees for any other person. We do not think that it

has ever before been held that a release executed by a person in his individual capacity and intended to relate to personal and individual dealings, operated to release any debt that might be due to such person as executor, administrator, guardian or other trustee for a third person. Such construction is contrary to the plain intent of the parties and does violence to the language used by the parties in the documents executed by them.

Evans vs. Wells, 22 Wend. (N. Y.) 324.

Trow vs. Shannon, 78 N. Y. 446.

We respectfully submit that the North Alaska Steamship Company was an indispensable party to this proceeding, and that there could be no adjudication of the relation of debtor and creditor between Dodge and that company in the absence of that company from the record, and as the establishment of the debt owing by the North Alaska Company to Dodge was an essential prerequisite to the adjudication of any liability of Waterhouse & Company to Dodge for that indebtedness, the case should have been dismissed for want of jurisdiction.

II.

The trust agreement relied upon by appellee as the basis of liability of Waterhouse & Company is in the following words:

“Memorandum between Frank S. Pusey, agent for G. M. Dodge, of New York, and Frank Waterhouse & Co., Inc., of Seattle, Washington.

The North Alaska Steamship Company is indebted to said Waterhouse & Co., Inc., in the sum of about \$37,-671.46 being balance due on purchase price of the Steamship 'Garonne,' and are also indebted to said G. M. Dodge in the sum of about ten thousand dollars for borrowed money.

It is agreed that said Waterhouse & Co., Inc., shall take a mortgage from said North Alaska Steamship Co. upon the steamship 'Garonne' to secure both claims above mentioned. The claim of said Waterhouse & Co., Inc., shall be prior and paramount under such mortgage, and the claim of said Dodge shall be secondary. Said Waterhouse & Co., Inc., shall take a note from said North Alaska Steamship Co., payable to them as trustee, for the amount so owing to said Dodge, said note to be payable in two months from date:

It is agreed that said Waterhouse & Co., Inc., in acting as such trustee for said Dodge in the securing of said indebtedness, assumes no liability whatever with reference thereto, except that it agrees to act in good faith.

FRANK S. PUSEY, Agent,
 For G. M. DODGE.
 FRANK WATERHOUSE & Co., INC.,
 By FRANK WATERHOUSE,
 President."

It will be observed that the only duty assumed by Waterhouse in that agreement was to "take a mortgage" from the North Alaska Steamship Company upon the steamship "Garonne" to secure both claims, and to take a note from the North Alaska Steamship Company payable to them as trustee for the amount owing to Dodge. The agreement further specifies that Waterhouse & Company "assumed no liability whatever with reference thereto except that it agrees to act in good faith."

. In order to clearly understand what was intended by the parties by the arrangement entered into on June 2nd, it is necessary to consider what was their status and their respective rights at that time. Waterhouse in his original option contract of sale had endeavored to protect himself against the possibility of the mortgage security for the deferred payments being rendered worthless by maritime liens created against the ship by the purchaser. To accomplish this he had specified in his contract that he must have a mortgage and the marine insurance on the vessel, and in addition thereto a guaranty bond conditioned that the vessel would be kept free of liens, and other collateral security for his notes satisfactory to him. These terms were all clearly expressed in the original contract. He had never at any time waived any of them. The purchasing company, although it had made the deferred payments, had not been able to furnish this bond and collateral security, and at its solicitation Waterhouse & Company had extended the time for the consummation of the contract of purchase for their accommodation. The purchaser had at various times suggested that it would be able to make full payment for the vessel to Waterhouse before the first of June, which would prevent, of course, the necessity of furnishing collateral security and the necessity for a bond would be obviated. The purchasing company, through its representatives, Ferguson and Hastings, had incurred indebtedness

against the ship. The telegraphic correspondence in the record shows that Waterhouse & Company were constantly demanding of the purchasing company either the payment of this indebtedness for outstanding liens and the furnishing of the security required by the contract, or the alternative of full payment of the purchase price, and was constantly receiving promises from New York that these debts would be paid. On May 23rd when the time was approaching for the vessel to sail for Nome, Waterhouse telegraphed to the purchaser as follows:

“Received twenty-five hundred from you Saturday. Same day advanced two thousand for you. Steamer must coal next Wednesday, expense five thousand. Insurance must be placed this week, expense six thousand year’s premium. Food supplies must be put aboard this week, expense six thousand. You now owe me money advanced five thousand. If balance purchase price paid immediately cash or satisfactory securities, you will be at liberty to contract all bills you desire ‘Garonne’s’ credit, and pay same out of freight and passenger receipts available June second. If purchase not completed immediately must have cash before can permit coal supplies and insurance to be purchased steamer’s credit. Please advise quickly what course you will pursue.”

Defendant’s Exhibit C-1, p. 391 Transcript.

He had previously wired them on May 20th that unless payments were made to protect him against the outstanding bills he would take the necessary steps at once to cancel the sale. (See Defendant’s Exhibit B-1, Transcript, p. 391.) The purchaser answered the telegram of May 23rd as follows:

“Appreciate urgency making all efforts close arrangement pay you.”

(Transcript, p. 399.)

No money having been received by Waterhouse & Company, notice was given to purchaser by his attorney that steps would be taken to cancel the contract at once. The purchaser under date of May 25th wired Waterhouse that money would be immediately furnished to pay for coal, supplies and insurance, and that Smith was leaving New York for Seattle to complete the contract. (See Defendant's Exhibit K-1, p. 398 Transcript.) Waterhouse replied under date of the 26th that these promises were unsatisfactory, and that the coal and supplies would not be permitted to go aboard the steamer until the money was received to pay for them. He also notified the purchaser that the securities for the deferred payments as called for by the contract must be executed and deposited with the Chase National Bank for his benefit, or the balance of the purchase price paid, before he would permit any further indebtedness to be incurred against the ship for either coal or supplies. (See Defendant's Exhibit O-1, p. 401 Transcript.) This was the status of things when Smith reached Seattle on May 31st. After his first interview with Waterhouse he wired his New York office as follows:

“W. will accept five thousand cash from New York at once and twenty-two thousand five hundred out of receipts, balance to be paid in thirty days, secured by mort-

gage and note. Remit five thousand immediately. Very imperative and must close at once."

Defendant's Exhibit "Y," Transcript, p. 389.

These communications clearly show the disposition of Waterhouse & Company at that time. They were demanding that the purchaser should either pay the balance of the purchase money or relieve the vessel of the supply liens and furnish the collateral security required by the contract under a penalty of having the contract forfeited if they failed to do so. In this condition of things Pusey arrived in Seattle and entered into the negotiations between Waterhouse and Smith. Up to that time Waterhouse had no relations whatever with Dodge. By a telegram and letter from the purchasing company in New York under date of May 17th, and received at Seattle on May 22nd, he was informed that some arrangement had been made by the purchasing company with Dodge which would in itself be a security for the indebtedness due Waterhouse. Assuming that this was some arrangement by which Dodge was to furnish the collateral security called for in the contract, Waterhouse wired the Chase National Bank of New York asking about Dodge's financial standing, and received a reply by wire to the effect that it was satisfactory. (Transcript, pp. ——.) This was the only information he had relative to Dodge's connection with the company. After he and Smith and Pusey had endeavored to ascertain the amount of the outstanding

bills against the "Garonne" for supplies, material and labor, and had ascertained, as they supposed, that it would not exceed \$15,000, it was agreed between them that Smith should have his New York company forward the money to pay off these bills. Waterhouse was to apply such an amount from the receipts from passengers and freight, amounting to about \$18,000, as would reduce the amount due him from \$55,000 to about \$37,000, and he agreed to accept twenty and forty day notes for that amount secured by first lien on the vessel. Pusey agreed to accept a second lien on the vessel for his \$10,000, payable in sixty days. The testimony shows conclusively, first, that these arrangements by which Waterhouse became a trustee was without consideration and purely an accommodation; second, that it was a condition of this arrangement that the North Alaska Steamship Company should at once pay off the outstanding lien debts against the ship, so that the mortgage securing Waterhouse would be a first lien on the vessel, and third, that this mortgage must be authorized by the board of directors and executed by the secretary under the seal of the company, as well as by Smith as its president. Inasmuch as Smith, the president of the North Alaska Steamship Company, was sailing on the "Garonne" for Nome, the documents were signed by him in Seattle and then immediately forwarded to New York in order that the execution of them might be approved by the board of directors and com-

pleted by the secretary. The whole tenor of the correspondence between the parties, as well as the testimony of the witnesses, shows that Waterhouse never contemplated the waiving of the rights he then held under his original contract, and the acceptance of a mortgage, unless the company would first pay off these maritime liens, which would be a superior incumbrance, paramount to his mortgage. The testimony further shows conclusively that the signing of the mortgage by Smith, as president of the company, was not considered nor understood by the parties at the time as completing its execution or creating any lien upon the vessel. It was fully understood that the mortgage could not be executed by the North Alaska Steamship Company unless it was authorized by the board of directors, and the signature of the secretary under the seal of the company attached to the instrument. It was for this purpose that the mortgage was sent to New York.

The board of directors and the secretary of the company, however, refused to sanction this arrangement entered into by Smith at Seattle, and the board refused to authorize the execution of the mortgage, and the secretary refused to complete its execution, and the company refused or failed to make any provision for the payment of the outstanding maritime liens.

On June 10th Messrs. McKee & Frost, the attorneys of the North Alaska Steamship Company, wrote to Waterhouse stating that the board of directors would not

authorize the secretary and treasurer to sign the mortgage until they had before them all of the particulars of the transactions in Seattle and a full statement of the steamship accounts to and including the first sailing. (See Defendant's Exhibit "F," Transcript, p. 369.)

On June 10th Waterhouse had wired the secretary of the company as follows:

"Have you executed mortgage and remitted money pay expense bills here? These matters pressing; require immediate attention. Answer. Special Rush."

Defendant's Exhibit "U," Transcript, p. 383.

On June 11th he again wired the secretary that the underwriters were demanding immediate payment of the insurance premium. (See Transcript, p. 377.)

On June 13th he again wired the secretary as follows:

"If you remit thirteen thousand tomorrow for expenses execute mortgage in Chase National Bank immediately and pay me \$8,600 June 22nd, I will extend balance of payments as follows: Ten thousand with interest on first note until July 12, entire amount of second note until August 15th. Answer."

In response to this he received a telegram from W. H. Rowe, the president of the purchasing company, as follows:

"Have consulted with those who have thus far financed our enterprise. They insist that no more money shall be paid until Mr. Mead has personal interview with you and goes over condition at Seattle. I trust you will await Mr. Mead's arrival he left today for Seattle."

See Defendant's Exhibit "G," Transcript, p. 370.

On the same day the Chase National Bank, holding the mortgage, wired the Washington National Bank in Seattle as follows:

"Respecting payments made to Waterhouse on boat we are requested by parties of responsibility and reputed wealth recently associated with Occidental Securities Co. to advise that pending payments will be made on satisfactory report by representative now en route. Notify Waterhouse."

Defendant's Exhibit "H," p. 371 Transcript.

On June 14th Mr. Rowe had also wired Waterhouse notifying him that Mr. Mead, the representative of the company, was leaving for Seattle, asking that matters stand in abeyance until his arrival. (Transcript, p. 372.) On June 14th Waterhouse had wired the company as follows:

"Will not let conditions remain as at present. Insist debts against 'Garonne' now due be paid immediately and mortgage be executed immediately. Will expect prompt reply stating definitely what you intend to do."

This correspondence proves beyond any question that Waterhouse & Company were making every exertion to secure the payment of the outstanding lien bills and the completion of the execution of the mortgage by the New York company, and that he was met with positive refusal by that company to make any payments or to complete the execution of the mortgage prior to the arrival in

Seattle of their representative, Mr. Mead, and his report upon the condition of the company. Under the tentative agreement with Smith and Pusey on June 2nd, one-half of the balance of the purchase money due Waterhouse, amounting to nearly \$19,000, was to be payable on June 22nd. The telegrams above quoted show that Waterhouse was insisting upon the execution of the mortgage and the payment of the outstanding lien bills up to the date when Mead left New York, when he was definitely informed that no payments would be made until after Mead reported. Mead reached Seattle about June 20th, and did not complete his examination until several days later. He then reported that nothing could be done in the matter at that time, but persuaded Waterhouse to return to New York with him. When Waterhouse reached New York on or about July 1st, the arrangement made with Smith and Pusey had fallen through. The company had refused to execute the mortgage and had failed to pay off the lien debts. The first payment of one-half of Waterhouse's purchase money was then some ten days past due. The court below used the following language in his opinion in this case:

“I hold, however, that the mortgage which was signed by the president of the steamship company, the promissory note for \$10,000 given to the defendant as trustee for the complainant, the assignment of freight money and the contract signed by the defendant and Pusey as agent for the complainant, constitute a contract binding upon all three of the parties. The documentary evi-

dence in the case proves that notice of the transaction was promptly sent to the secretary of the steamship company in New York, and that Smith's authority as president of the company was not disputed."

We most respectfully submit that this finding is directly contrary to all the evidence in the case. The secretary of the company not only failed to complete the execution of the mortgage, but reported to Waterhouse that no moneys would be advanced until after Mead's report. The attorneys for the company notified Waterhouse that the board of directors refused to authorize the execution of the mortgage by its secretary and treasurer until after they should have an opportunity to examine Mead's report. There is absolutely nothing in the record to show that Smith, as president, was authorized to execute a mortgage upon any vessel owned by the company, and the record affirmatively shows that he did not undertake to do so. On the contrary the mortgage as drawn shows on its face that it was to be executed by both the president and secretary as the officers of the company and under the seal of the company, and it was by agreement of all of the parties immediately sent to New York with the request that the board of directors would authorize its execution and that the secretary would complete the execution. We most respectfully submit, therefore, that the court erred in holding that this document, which was never executed, constituted any lien upon the vessel.

The trust agreement specifies that Waterhouse & Company are to "take a mortgage" from the North Alaska Steamship Company to secure both debts. We insist that Waterhouse did everything that he could do to induce the North Alaska Steamship Company to execute the mortgage, and that company refused to do so; that his entire obligation under this trust agreement with respect to taking of security for Dodge's debt, was discharged. He was named as trustee for Dodge merely to simplify a foreclosure if after the mortgage was executed a foreclosure was necessary. He did not undertake to become an active collecting agent for Dodge, and in our judgment no such obligation can be gathered from the terms of the trust agreement. If the finding of the court below to the effect that this mortgage became a subsisting security for Dodge's debt cannot be upheld under the evidence, then we think a reversal necessarily follows.

The court below held that Waterhouse should have notified Dodge of the negotiations in New York, and finds him guilty of inexcusable negligence in failing to do so. In this connection it must be remembered that Dodge was associated with the purchasing company. He was on terms of personal intimacy with Smith, its president, and testifies that his advance of money to the company was largely because of his personal relations with Smith. He was known to all of the stockholders and to the other creditors in New York. When the company refused to ex-

ecute the mortgage promptly, and allowed the time (June 22nd) when the first payment of one-half of his debt to pass, Waterhouse considered that the tentative agreement with Smith had fallen through. We think that he was amply justified in so believing. Even if Dodge had appeared in New York and had then been willing or had persuaded the company at that time to carry out the agreement that Smith had entered into, we think that Waterhouse could not technically have been compelled to carry it out. If he can be considered to have contemplated by the agreement with Smith a waiver of his right to cancel the original contract for a default of the purchaser, such contemplated waiver must be held to have been upon the express condition that the mortgage would be executed before June 22, when one-half of the purchase money would be paid, and the balance of it secured by first lien on the vessel payable twenty days thereafter. Now when he went to New York this condition had failed; the time had passed and the payment had not been made or the mortgage executed.

Waterhouse at that time, therefore, considered Dodge as standing upon the same basis as all other creditors. The company had refused to give him a second mortgage securing his \$10,000. He took the same means of notifying Dodge of the critical condition of the company's interest in the property that he did with respect to other creditors and stockholders of the company. He stood on

one side of the counter and Dodge and the other creditors and stockholders stood on the other side. He was not seeking to conceal anything from Dodge. He trusted to the officers and stockholders of the company to notify all interested parties of what was going on. In the case of Dodge he made a special effort to have him notified. He requested Mr. Corwine, one of the stockholders of the company, to communicate with Dodge and secure his attendance at the conference and was informed by Mr. Corwine that Dodge was out of the city and not accessible. We take the position that Waterhouse owed no special duty to Dodge at that time, and that if he did, he took such reasonable steps to notify him as any other stranger in the city under the same circumstances would have taken. The court below assumes that the interests of the stockholders in the company, particularly of Corwine, were antagonistic to Dodge, and seems to infer that they made no effort to notify Dodge of these negotiations. The appellant is of course in no position to know whether these inferences of the court are correct or not. Waterhouse was in New York, a stranger dealing with strangers. He had no personal acquaintance with any of the parties interested in the North Alaska Steamship Company. He had no personal acquaintance with Dodge. His telegram to the Chase National Bank (See Record, p. 392) shows that he did not know who Dodge was and had no information as to his financial standing or "national reputation." Certainly there is nothing in the record that would justify

a holding that Waterhouse at that time owed any duty to Dodge which he disregarded, or that he was not acting in good faith in his attempt to notify him of the negotiations then pending, or of the failure of the company to execute the security which Smith had agreed to give.

The court below in substance holds that inasmuch as Waterhouse held the legal title to the vessel, and Smith, the president of the North Alaska Steamship Company, had verbally agreed that that company would give a mortgage to secure Dodge's debt, and Waterhouse had agreed to act as trustee in taking that mortgage, in equity he would be considered as holding the legal title to the vessel as security for the Dodge debt. We respectfully submit that such a holding amounts to the creation of a contract by the court which Waterhouse never agreed to make. In the first place, he held the legal title to the vessel with the right to cancel the contract of sale upon default on the part of the purchaser as security for his own debt. This security could not be converted into a security for Dodge's debt by any agreement between Waterhouse and Dodge. The North Alaska Steamship Company was Dodge's debtor, and its consent would have to be obtained before Waterhouse could in law or equity hold the legal title as security for the Dodge debt. This assent the North Alaska Steamship Company positively refused to give. In the second place Waterhouse agreed to waive his right to cancel the contract only on condition that the out-

standing maritime liens against the vessel were first paid by the company and a mortgage executed which would be a first lien securing the balance of his purchase money, and this was to be done prior to June 22nd, when his first payment was due. Now the court below has ignored these conditions, and has held Waterhouse to the waiver of his right to cancel the original contract, notwithstanding a refusal and failure of the North Alaska Steamship Company to comply with any of the conditions upon which he agreed to accept security on the vessel alone in lieu of his original contract. Instead of having a mortgage payable in twenty and forty days from June 2 upon the vessel, clear and free of all liens, the court, after a failure of the vendee to comply with the terms of the agreement, puts Waterhouse in the position of holding a security upon the vessel for his own purchase money and a second lien for the security of Dodge, and both of these debts subject to prior maritime liens amounting to over \$30,000 past due and which Waterhouse was forced to take care of at his own expense. It seems to us that the simple statement of the facts shows that the court below was in error in this holding.

The court below also held that the contract entered into between Waterhouse and King after the North Alaska Steamship Company had abandoned its purchase, was a violation of the duties owing by Waterhouse to Dodge. As stated above, we think that Waterhouse's

duty to Dodge was fully performed when he endeavored to secure the execution of the mortgage securing Dodge's debt, and the debtor refused to execute it. To hold otherwise is to read something into the trust agreement in addition to what is there expressed. If, however, the court should hold that Waterhouse was still under some duty to endeavor to secure Dodge's debt, we think the record clearly shows that it was impossible to do so at that time without putting himself in very embarrassing financial position, and he was not required by any of the terms of the trust agreement to do so. The trust agreement expressly provides that there shall be no liability upon the part of Waterhouse to Dodge, provided he acts in good faith. When the North Alaska Steamship Company abandoned its contract of purchase, it was known to be utterly insolvent, in fact it had never had any assets, except the equity in the vessel, and this it had abandoned because of its inability to complete its purchase. Waterhouse was then confronted with something over \$30,000 maritime liens against the vessel contracted by the North Alaska Steamship Company which that company was unable to pay and which were past due and many of them pressing for payment. In other words, he was in a position where the vessel would be liable and sold for these debts unless immediately provided with means of payment. He then turned to a Mr. King, one of the stockholders of the North Alaska Steamship Company, and offered to sell the vessel on a basis of \$67,000, clear of

liens, if King would raise \$30,000 of the \$67,000, to be used in paying off these debts. This proposition, with a modification which gave King an equal voice in the management of the company to be organized to take title to the vessel, was accepted and carried out. This arrangement was not made nor any similar arrangement contemplated until after the North Alaska Steamship Company finally abandoned its contract of purchase. It was entered into by Waterhouse in perfect good faith and as the only means open to him to raise the money with which to pay the debts which were then pressing against the vessel. We feel confident that the court will find nothing in the record that will indicate in the remotest way that in entering into this arrangement Waterhouse was not acting in perfect good faith.

We contend finally that even if the court should hold that Waterhouse owed the duty to Dodge of notifying him of the failure of the North Alaska Steamship Company to execute the mortgage securing his debt, it cannot be held that the failure to give such notice rendered Waterhouse & Company liable for that debt. Dodge testified that he was informed of what had been done in New York on or about the 25th of July, 1904. If, as is now claimed, he asserted a lien on the vessel for his \$10,000, good faith required that he should notify Waterhouse & Company of such claim promptly. He knew that Waterhouse was acting on the assumption that the failure of the company

to execute the mortgage ended any obligations Waterhouse had assumed to take security for Dodge's debt. Dodge did not assert any lien on the vessel, but apparently acquiesced in what had been done until in April, 1905, after the vessel had been sold by the company organized by King and Waterhouse, and it had passed out of Waterhouse's control. If Dodge had promptly asserted his claim to a lien and it had been established by the court, the vessel would have been sold for the purpose of paying, first, the maritime liens which had been paid off with the money received from King; second, the balance due Waterhouse on the purchase money, and, third, any amount due Dodge. Instead of proceeding promptly to assert his rights, he waited until the vessel had been disposed of and had passed into the hands of another company. We think the conditions were such as to require prompt action upon the part of Dodge in repudiating what had been done by Waterhouse and in asserting his lien upon the vessel. The court below found that the vessel was worth more than the outstanding liens and both Waterhouse and Dodge's debts. Some of the testimony would sustain that finding; other testimony showed a much less value. Prompt action on the part of Dodge would have avoided any uncertainty upon that question, because the vessel would have been in the hands of the Merchants & Miners Steamship Company and its sale would have settled definitely the question of its value.

We think that a careful perusal of the testimony in this case will convince the court that the decree appealed from is unjust, and that it should be reversed. The conduct of Waterhouse & Company throughout the entire transaction from the time they made the original option contract of sale to the time they conveyed the vessel to the Merchants & Miners Steamship Company has been characterized by perfect fairness toward all parties interested. They have endeavored to accommodate other interested parties just as far as they possibly could without impairing their own security or financial damage to themselves. It was for this that they extended the time for the North Alaska Steamship Company to execute the collateral securities for the deferred payments, first from February 15th to March 15th, and subsequently from March 15th down to the 5th of June. In the same spirit they agreed to waive their demand for collateral security for the deferred payments on the 2nd of June on condition that the North Alaska Steamship Company would pay off the lien debts contracted by them on the vessel, and would secure the balance of the purchase price by a mortgage which would in fact be a first lien on the vessel. It was in this same spirit that they consented to act as trustee for Dodge in taking the mortgage, and in the same spirit during the negotiations in New York they offered to extend the balance of the purchase money payments to six, twelve and eighteen months, provided that company

would promptly pay off all outstanding liens on the ship. We think the record discloses that this suit is an effort upon the part of Dodge to take unjust advantage of this spirit of accommodation shown by Waterhouse & Company.

Respectfully submitted,

W. H. BOGLE,

CHAS. P. SPOONER,

Solicitors for Appellant.

